

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DAVID J. KAPPOS, UNDER SECRETARY :

4 OF COMMERCE FOR INTELLECTUAL :

5 PROPERTY AND DIRECTOR, PATENT :

6 AND TRADEMARK OFFICE, : No. 10-1219

7 Petitioner :

8 v. :

9 GILBERT P. HYATT. :

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11 Washington, D.C.

12 Monday, January 9, 2012

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14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 11:05 a.m.

17 APPEARANCES:

18 GINGER D. ANDERS, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington, D.C.; for
20 Petitioner.

21 AARON M. PANNER, ESQ., Washington, D.C.; for

22 Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 10-1219, Kappos v. Hyatt.

Ms. Anders.

ORAL ARGUMENT OF GINGER D. ANDERS

ON BEHALF OF THE PETITIONER

MS. ANDERS: Thank you. Mr. Chief Justice, and may it please the Court:

Section 145 of the Patent Act permits a person who has sought a patent from the PTO and believes that the agency has wrongly denied his application to seek judicial review of that decision in district court. The Federal Circuit in this case held that the plaintiff in a section 145 action may obtain a more favorable standard of review, de novo review, by flouting the PTO's rules during the examination process.

Under the court's approach, a plaintiff may present to the court material new evidence that he refused or failed without cause to present to the PTO. And as his reward, he is given de novo review of the PTO's expert determinations on all of the relevant issues.

For three reasons, that unprecedented regime should not be allowed to stand: First, principles of

1 administrative deference and exhaustion require that the
2 PTO be given the opportunity to apply its expert
3 judgment to all of the reasonably available evidence.
4 For that reason, section 145 should be interpreted as a
5 safety valve proceeding that permits applicants to
6 introduce evidence to the court that they reasonably
7 could not have presented to the PTO.

8 JUSTICE SCALIA: Can you only get a 145
9 proceeding when you have new evidence?

10 MS. ANDERS: No.

11 JUSTICE SCALIA: Suppose I have no new
12 evidence and -- and I want to challenge. Can I bring a
13 145?

14 MS. ANDERS: Yes, section 145 --

15 JUSTICE SCALIA: Right.

16 MS. ANDERS: -- permits any applicant
17 dissatisfied with a decision of the PTO --

18 JUSTICE SCALIA: And on what basis does the
19 court decide the case? De novo?

20 MS. ANDERS: No, the Federal Circuit has
21 held that in those cases substantial evidence review
22 applies, and where the Federal Circuit gets that is this
23 Court's case in Morgan v. Daniels. That was an action
24 under section 145's predecessor. There was no new
25 evidence in that case, and the Court held that this was

1 a proceeding in the nature of a suit to set aside a
2 judgment, the judgment of the expert agency which had
3 made this determination, and that, therefore, because
4 this was administrative review, a deferential standard
5 of review should apply.

6 JUSTICE SCALIA: Yes.

7 MS. ANDERS: So, it's quite clear that
8 when --

9 JUSTICE SCALIA: How close a predecessor is
10 the predecessor?

11 MS. ANDERS: All of the material language is
12 -- is the same. There's -- there's no material
13 difference for purposes of this case.

14 JUSTICE GINSBURG: But the Morgan case
15 involved -- it wasn't a contest between the PTO and the
16 would-be patent holder; it was an interference
17 proceeding, wasn't it?

18 MS. ANDERS: That's correct, Justice
19 Ginsburg. It was an interference proceeding, and that's
20 because, at the time, section 145's predecessor applied
21 equally to interferences and to ex parte patent denials.
22 But the Court's reasoning, its discussion of -- of the
23 predecessor statute, did not distinguish based on the
24 fact that this was an interference. And also this
25 Court --

1 JUSTICE SOTOMAYOR: I thought that -- it's
2 interesting that the language of Morgan and one of its
3 companion cases, not companion in the sense of being
4 heard at the same time, but on the same issue -- Radio
5 City case -- both of them don't talk in the language of
6 today. They don't talk about deference. They don't
7 talk about substantial evidence. They talk about
8 whether the PTO has expertise, and presumptions that
9 their factfindings based on their expertise have to be
10 overcome with some convincing evidence.

11 So, they're talking in different language,
12 but the concept they're talking about is one where the
13 court does accept findings of the PTO on the matters
14 that involve their expertise and give them weight,
15 substantial weight, essentially, and only overturn it if
16 the court is, in the words of Morgan and Radio City,
17 "thoroughly convinced" that they were wrong.

18 So, what's wrong with that standard?
19 Everybody likes the deference language of today, but
20 they were very clear in what they were saying: If the
21 PTO made a finding, you decide whether that finding was
22 based on its expertise, and if it was, you don't change
23 it, court, unless you're thoroughly convinced they were
24 wrong.

25 Is there anything wrong with that? With

1 that articulation of what the standard should be in all
2 situations, whether there's new evidence or no new
3 evidence?

4 MS. ANDERS: Well, I think here we are
5 suggesting that in -- in 145 actions, when there is new
6 evidence, the -- Morgan's "thorough conviction" standard
7 should apply. And that reflects the fact that the court
8 needs to look at the new evidence, but because the PTO
9 has made an expert determination, as the Court said in
10 Morgan, that determination should not be overturned
11 unless there's a high degree of certainty.

12 And I would note that that is essentially
13 what this Court did just last term in Microsoft v. i4i.
14 There the Court said that when a third party is
15 challenging the validity of a granted patent, that the
16 third party should have to show invalidity based on a
17 heightened burden of proof, clear and convincing
18 evidence. And that reflects the same wisdom that --
19 that underlies --

20 JUSTICE SOTOMAYOR: All right. Let me tell
21 you what my problem is with this case. It is the issue
22 that Verizon raised and the lack of connection between
23 the district court's holding and the circuit court's
24 holding. The district court excluded the affidavit for
25 the proposed arguments on the basis of them being new

1 arguments that Board rules precluded them from raising
2 at the stage they did. The circuit court described the
3 affidavit as new evidence. And the Verizon amicus brief
4 says: Court, be careful, because it's not really clear
5 what's new evidence in this affidavit and what's new
6 argument.

7 And that question troubles me, for the
8 following reason: Verizon posits that the issue of
9 whether a description is specific enough is a legal
10 question to which the PTO is not entitled to deference.
11 Why, other than Federal Circuit and Patent Board
12 precedent, is that right? And can you explain why this
13 affidavit that was rejected is in fact new evidence and
14 not merely new argument?

15 MS. ANDERS: Certainly, Justice Sotomayor.

16 I think the district court did characterize
17 this as new evidence, and the reason it did that was
18 because Mr. Hyatt made a concerted strategic decision
19 here to present his affidavit as new evidence. In form,
20 this is -- this is factual evidence. This is a
21 declaration containing proffered testimony that Mr.
22 Hyatt would offer if there were a trial. So, it is in
23 form factual evidence, and in order to take advantage of
24 the possibility of introducing new evidence in the
25 section 145 action, Mr. Hyatt argued that this was

1 new factual evidence that should --

2 JUSTICE SOTOMAYOR: Could you tell me what
3 -- other than that it's in the form of an affidavit,
4 tell me what in the content was new evidence? I want to
5 get away from the labels, and I want to get to the
6 substance because I've looked at all of these
7 submissions, and it sounds like what I read in briefs
8 every day.

9 MS. ANDERS: Certainly. I think whether or
10 not the -- the ultimate question of whether the written
11 description is sufficient is a question of law. It
12 would be one that rests on several subsidiary
13 factfindings, including what the ordinary skill in the
14 art is, what a person of ordinary skill in the art would
15 understand when he reads the specification, and where in
16 the specification there is support, there is description
17 support, for the claims that shows that Mr. Hyatt
18 possessed the invention that he claimed.

19 And so, I think when you look at what
20 happened at the PTO, the examiner said: Despite my
21 expertise, I can't tell where in the specification your
22 claims are supported. This is at 258 -- it's a 250-page
23 specification reprinted in the joint appendix. It has
24 over 100 pages of diagrams, source code, and 117 claims.
25 And so, the PTO asked for this information; Mr. Hyatt

1 refused to present it or he didn't present it, and then,
2 on rehearing, the Board said that he had not had any
3 cause not to present this new -- this new argument. And
4 so, at that point, Mr. Hyatt went into the 145
5 proceeding, and he was -- he characterized this as
6 factual evidence in order to get around, presumably, or
7 it would be reasonable to try to get around, the Board's
8 ruling that he couldn't present new evidence.

9 Now, you certainly could characterize this
10 as legal argument. We believe that we would win on that
11 ground as well, even if this were new argument, because
12 certainly the PTO is entitled to enforce its rules here,
13 and both the district court and the panel found that the
14 PTO did not abuse its discretion in -- in holding that
15 Mr. Hyatt had forfeited his right to raise this
16 argument. But that's not -- that's not an additional
17 question presented that we -- that we added here because
18 it's a very case-specific question.

19 But at any rate, the -- the entire case has
20 now been litigated on the basis of this being factual
21 evidence --

22 JUSTICE SCALIA: Your case is stronger if it
23 isn't new facts, right? That's what you'd say.

24 MS. ANDERS: I'm sorry?

25 JUSTICE SCALIA: Your case is stronger if in

1 fact it's only new argument and not new fact.

2 MS. ANDERS: Certainly. I think it should
3 be very clear that we would win on that ground. The en
4 banc court here characterized this as new factual
5 evidence and applied a rule that will -- will govern, if
6 it's left to stand, in all 145 actions, which would
7 permit applicants to withhold evidence from the PTO.

8 JUSTICE GINSBURG: Ms. Anders, one of the
9 problems with, I think, your position, is it sounds very
10 strange to have two proceedings, one where you go
11 directly to the Federal Circuit under 101 -- 141; and
12 then this other one where you go to the district court,
13 where if that's not, as Judge Newman said, a whole new
14 -- whole new game, then why would Congress create two
15 judicial review routes, one in the district court
16 reviewable in the Federal Circuit, the other directly in
17 the Federal Circuit, if there's no difference? That is,
18 if in both of them, it's not de novo review; it is
19 reviewing what the -- what the agency did under the
20 ordinary standard for reviewing agency action.

21 What's different about the -- the 145
22 proceeding?

23 MS. ANDERS: Well, in the 145 proceeding,
24 the applicant has the ability to introduce new evidence
25 that couldn't be presented to the PTO. And I think --

1 JUSTICE KAGAN: But what kind of evidence is
2 that, Ms. Anders?

3 MS. ANDERS: Well, I think there are two
4 primary categories, both of which can be very important
5 in the examination proceedings. The first is oral
6 testimony. The PTO doesn't hear oral testimony, but it
7 is routine in the examination procedures for --

8 JUSTICE KAGAN: So, in the 145, an applicant
9 can take all his written affidavits and say: I want to
10 present oral testimony, on these exact matters, but
11 live.

12 MS. ANDERS: He could -- he could certainly
13 bring that to the district court, yes. Now, the
14 district court always, under general evidentiary rules,
15 can say: I believe this evidence is cumulative; so, I'm
16 not going to hear it.

17 But to the extent that the district court
18 believes it would be helpful to hear oral testimony, for
19 instance, if the PTO's determinations involve
20 credibility decisions, then certainly the district court
21 could hear that testimony, and that's often how these
22 proceedings have been used.

23 JUSTICE KAGAN: But to the extent the
24 substance of that testimony was something that he could
25 have brought to the PTO, that testimony, in your view,

1 would be out of bounds.

2 MS. ANDERS: There would have to be a
3 reasonable justification for not having presented it --

4 JUSTICE BREYER: There has to be a
5 reasonable -- some kind of justification. Can you work
6 with the word "equitable"? I mean, this was an
7 equitable action, and could you say that the -- to the
8 district court, well, of course, you -- assuming you'd
9 win on the second question. But on the first question,
10 this is not an on/off thing. That's your real objection
11 to the de novo standard.

12 You say: But these are equitable actions,
13 and generally an individual should not be allowed to run
14 around the PTO. So, you better have some kind of
15 reason, but leave it up to the -- to the district courts
16 to work with that word "equitable" and to -- it seems to
17 me there will be a lot of shading cases here where you
18 can't quite tell if it is new or isn't new and some
19 parts are and some aren't. But just leave it up to the
20 district court and say: Take into account the fact that
21 people should not be allowed to run around the PTO and
22 work equity. That's kicking the ball back.

23 Now, if you like that, let me know. If you
24 don't like it, tell me what we -- why -- what should
25 we -- you want an absolute rule? Tell me why.

1 MS. ANDERS: Well, the standard we're
2 proposing is that the district court has discretion to
3 determine whether there was reasonable cause not to
4 present the evidence to the PTO.

5 JUSTICE BREYER: And if it says there isn't,
6 then it can't hear it? I mean, imagine you're sitting
7 there as a district judge, you think: Oh, my God, they
8 should have presented it, but this is the key matter
9 forever. Do I really pay no attention to it at all?

10 MS. ANDERS: Well, I think it's no different
11 from exhaustion or forfeiture rules in any other
12 context --

13 JUSTICE BREYER: Except you have a history
14 here.

15 MS. ANDERS: The Board applicant has the --

16 JUSTICE BREYER: You have the history of the
17 pre-APA section 145 where they apparently did take the
18 evidence in.

19 MS. ANDERS: Well, certainly in the early
20 cases, they took new evidence in. But by 1952, which is
21 when Congress re-enacted this provision, you have the
22 lower courts applying the Morgan standard and saying:
23 Based on Morgan's reasoning, because we know that the
24 PTO is the primary factfinder, because we know their
25 decision is so important, we will apply limitations on

1 new evidence because we don't think that that
2 evidence --

3 JUSTICE KAGAN: But then you really do go
4 back to Justice Ginsburg's question because your
5 understanding of what they wouldn't have a reasonable
6 opportunity to present -- I mean, it's very, very
7 narrow. It's a bunch of cumulative testimony that
8 nobody would want to present and no judge would want to
9 hear. And other than that, you're basically saying in
10 all circumstances, well, they could have done that in
11 the PTO. So, then you have Justice Ginsburg's problem,
12 which is these are two channels that are exactly the
13 same.

14 JUSTICE GINSBURG: And you were beginning to
15 answer that by saying, well, you can't have oral
16 testimony before the PTO. But what else? I asked you
17 what would be -- what's different about 141 and 145 on
18 your view. And you said one thing is oral testimony.
19 What else?

20 MS. ANDERS: Well, the other primary
21 category of evidence that could come in would be
22 evidence that has a temporal component. If there's a
23 lot of evidence that could be relevant to patentability
24 that develops only slowly or that might arise very late
25 in the process. So, for instance, obviousness is a --

1 is a very common ground of rejection. But one thing
2 that can be relevant to obviousness is if the invention,
3 once disclosed, has commercial success. So, this type
4 of sales evidence can -- can develop very late in --

5 JUSTICE KAGAN: But I thought that your
6 brief suggested that even with respect to that kind of
7 evidence, a person can go back to the PTO. Is that
8 right?

9 MS. ANDERS: For the most part, the record
10 closes once the -- once the applicant files his brief on
11 appeal to the Board. And then it can be months or years
12 before the Board issues its decision.

13 Now, there are -- there are a couple of
14 avenues through which an applicant could still introduce
15 new evidence even when the Board is considering the
16 appeal. But both of those, as the process goes --
17 that's the request for continuing examination and the
18 continuation application. Both of those have increasing
19 down sides that require the applicant to abandon his
20 appeal or give up some of his patent -- the patent term
21 that he would presumably get. So --

22 CHIEF JUSTICE ROBERTS: What if -- what if
23 the new evidence is in reaction to the PTO's ruling?
24 The PTO says: Look, we're not -- we're not going to
25 issue a patent because you didn't show us that, you

1 know, the valve in the back of the thing or whatever
2 was -- was novel, and we think that's important. So --
3 and the applicant goes to, under 145, to the district
4 court and said: Well, I didn't submit that evidence
5 because I didn't have any idea that that was going to be
6 a significant issue, and I'm -- you know, I'm sorry,
7 but, you know, I have a good basis for not thinking of
8 that, and here it is.

9 Is that the type of new evidence that could
10 be admitted?

11 MS. ANDERS: Well, in the first instance,
12 the PTO's procedures actually provide -- they actually
13 provide for this situation, and that's when the Board or
14 the examiner enters a new ground of rejection. Then, at
15 that point, the applicant has the right to reopen
16 prosecution that -- introduce new evidence --

17 CHIEF JUSTICE ROBERTS: So, this is an
18 exception? I thought you were telling us earlier you
19 generally can't get --

20 MS. ANDERS: Right. Yes. I'm sorry. This
21 is -- this is an exception --

22 CHIEF JUSTICE ROBERTS: Oh.

23 MS. ANDERS: -- that would apply when
24 there's a new ground of decision. That is something
25 that Mr. Hyatt could have tried to take advantage of.

1 He -- he didn't. He simply sought rehearing. But in
2 any event, both the district court -- the district court
3 carefully considered the Board's grounds of rejection
4 and decided that this wasn't -- that these weren't new
5 grounds of rejection, and the panel affirmed that.

6 But to get back to the difference between
7 141 and 145, I think Congress separated these two
8 proceedings out in 1927. Before that, you had gotten an
9 appeal first on the record and then -- and then the bill
10 in equity under 145. So, Congress separated this in
11 1927, and it appears from the legislative history that
12 it's concerned with streamlining the proceeding and
13 having more efficiency in -- in patent appeals.

14 So, it would be reasonable to conclude that
15 there would be some number of applicants who -- probably
16 the majority of applicants, who wouldn't have new
17 evidence, who could go to 141 and simply get a final
18 decision from a court after one court proceeding in the
19 court of appeals.

20 JUSTICE KENNEDY: What evidence --

21 MS. ANDERS: But --

22 JUSTICE KENNEDY: Oh, please, continue.

23 MS. ANDERS: Simply that there are -- for
24 some number of other applicants, it was important to
25 provide a safety valve because the PTO couldn't consider

1 oral testimony and because certainly, at the time, oral
2 testimony was a major concern in interference
3 proceedings, where you'd often have two inventors saying
4 I invented it first; no, I invented it first. And you'd
5 have this credibility fight. So, it was very important
6 at the time to provide a safety valve proceeding for
7 those applicants.

8 JUSTICE GINSBURG: But you said that you
9 could -- you could go into court on 145 even if you had
10 no new evidence.

11 MS. ANDERS: Yes, and Morgan, in fact, was a
12 case like that. It appears some applicants may have
13 done that, but --

14 JUSTICE GINSBURG: So, you do -- in that
15 case, would there be any difference between 141 and 145
16 other than you go to a different court?

17 MS. ANDERS: No, I don't think there would
18 be for an applicant who had no new evidence at that
19 time. But I think the -- the other alternative, to
20 treat 145 as an entirely de novo proceeding that allows
21 any new evidence that the applicant failed without cause
22 to present to the PTO, thereby obtaining de novo review,
23 it's -- there's no evident policy justification for
24 Congress to provide it.

25 JUSTICE KENNEDY: Well, that was -- that was

1 Judge Newman's view, but the en banc court took the
2 middle position. Often, in trial court evidence
3 problems, the judge says, well, it goes to its weight,
4 not the admissibility. And it seems to me that's what
5 Judge -- the en banc majority was saying, that the fact
6 that it was not presented before or that it points in a
7 different direction from what the PTO found goes to its
8 weight, not its admissibility. In other words, they
9 will give consideration to the fact that it wasn't
10 introduced and -- and maybe discount it as a result,
11 unless there's a reason. So, it just depends on the
12 facts of the case.

13 Number one, am I reading or am I summarizing
14 the en banc majority correctly? And, number two, why
15 isn't that a sensible way to interpret the statute so,
16 as Justice Ginsburg is suggesting, you give some meaning
17 to 145? It's -- it performs a function that 141 does
18 not.

19 MS. ANDERS: Well, I think you're correct,
20 Justice Kennedy, that -- that the en banc court believed
21 that administrative deference principles didn't weigh
22 against its conclusions because the district court could
23 give more weight to the new evidence.

24 But that is not an adequate response, we
25 don't think, because this is still de novo review. So,

1 once the applicant introduces new evidence, the manner
2 in which the district court evaluates the PTO's
3 conclusions has entirely changed. This is no longer a
4 deferential standard looking at the evidence. This is
5 actually a de novo review, with no deference given to
6 any of the PTO's factfindings, even on the evidence
7 before it. And we don't think that's a sensible way to
8 read the statute because there's no basis in the text of
9 the statute for a bifurcated standard that would provide
10 for deferential "thorough conviction" review when
11 there's no new evidence, but then de novo --

12 JUSTICE KENNEDY: Well, then -- then you're
13 saying that we -- that we should choose either between
14 your position or Judge Newman's position.

15 MS. ANDERS: Well, Judge Newman's position I
16 think is inconsistent with Morgan, because Morgan was a
17 section -- Revised Statute 4915 action. It was a 145
18 action with no new evidence. And the Court there said
19 that the "thorough conviction" standard should apply
20 because this was administrative review. So, to hold
21 that 145 requires de novo review even when there's no
22 new evidence would be to overrule Morgan.

23 JUSTICE SOTOMAYOR: I'm not sure why --

24 JUSTICE KAGAN: But Morgan only talked about
25 the standard of review; isn't that right? Morgan has

1 very little to say about what types of evidence ought to
2 be admitted in this proceeding. And one thing we could
3 do is to separate out these two things and say, you
4 know, we think that there's a basis for one, for, let's
5 say, giving the government a fairly deferential standard
6 of review -- call it clear and convincing, call it
7 thorough conviction -- but go the other way, rule
8 against you, on the evidentiary point, which Morgan says
9 nothing about.

10 MS. ANDERS: Well, I think Morgan did not
11 directly address this -- the admissibility of new
12 evidence, but by saying that the PTO is the primary
13 decisionmaker and that the court should not lightly set
14 aside what the PTO does, it invoked administrative
15 deference principles, which in turn show why all of the
16 reasonably available evidence needs to be presented to
17 the agency.

18 And -- I do think that it -- it wouldn't
19 make sense to have a de novo standard of review for
20 patent denials any time new evidence comes in, largely
21 based on this Court's decision in Microsoft. There, the
22 Court rejected the argument that a third party who had
23 no opportunity to present evidence to the PTO should not
24 be held to as high a standard of review. So, it would
25 be particularly perverse here to say that de novo review

1 should apply whenever a patent applicant puts in any new
2 evidence that --

3 JUSTICE SOTOMAYOR: But I don't know that
4 that -- I think you're confusing the nature of the
5 review, which is de novo, new, with the -- the burdens
6 that attach to the proof. Those are two different
7 concepts. And so, that's what Microsoft said. Don't
8 confuse burdens with standards of review. That it's de
9 novo review is one thing, but even in de novo review, we
10 often give more weight or presumptive weight to some
11 facts as opposed to others. And that's what I think
12 Morgan was talking about. Morgan was very clear:
13 Whether it was new evidence or not, you give -- you
14 accept as valid whatever the PTO does, and you require
15 to be thoroughly convinced by new evidence or not that
16 they were wrong.

17 I don't know why that standard can't apply
18 in any situation. I think that's what Judge Newman
19 intended, although he didn't say that.

20 So, why are we confusing the standard of
21 review with the burden?

22 MS. ANDERS: Well, I think that the
23 presumption of validity and the need to give deference
24 to the PTO's determinations are essentially two ways
25 of -- of saying the same thing. As Microsoft noted, the

1 presumption of -- of validity comes from the assumption
2 that the agency is presumed to do its job. That's what
3 Judge Rich said. And that in turn is what the Court
4 said in RCA, where it announced the presumption of
5 validity, and there it relied on Morgan.

6 JUSTICE SOTOMAYOR: I have two problems with
7 your argument. The first is -- and I know that it may
8 be unique to me because many of my colleagues say that
9 you don't rely on legislative history, but I'm not
10 relying just on legislative history. I'm relying that
11 the legislative history is replete with the commissioner
12 of patents himself saying that section 145 required de
13 novo review. And witness after witness tried to argue
14 for Congress to change it, and it didn't, arguing that
15 it required de novo review.

16 Second, our cases repeatedly describe it as
17 de novo review. So, you got to get past that.

18 And then you got to get past that between
19 1927 and 1945 you have Barrett on your side. But there
20 are plenty of courts, including the Second Circuit, and
21 a very respected jurist, Learned Hand, saying that if
22 you exclude new evidence, it should only be if it's on
23 principles of estoppel, that someone intentionally
24 withheld evidence from the PTO.

25 So, how do you deal with a record that

1 doesn't basic -- that doesn't support your basic
2 argument?

3 MS. ANDERS: I think the record does support
4 our argument, Justice Sotomayor, because what you see in
5 the early 20th century after Morgan had construed this
6 as administrative review -- you referred to the 1927
7 hearings. There, I think many of the people used the
8 phrase "de novo" in a very loose way that probably was a
9 result of its dating before the APA. They referred to
10 it mostly as -- as a contrast between the original
11 action and the appeal. And that's the same thing you
12 see in the early cases. For instance, Globe-Union
13 referred to this as a de novo proceeding, even as it
14 said that the thorough conviction standard should apply
15 and new evidence should be limited because this was
16 administrative. So, I don't think you can place very
17 much weight on the use of the term "de novo."

18 I do think it's notable that every time
19 there was an objection in the cases before 1952, the
20 courts applied limitations on new evidence. Dowling,
21 the case you referred to -- that was -- that was dicta;
22 the court discussed the standard but didn't actually
23 apply it there. And so, I think the most natural
24 inference is that in 1952, Congress looked to Morgan and
25 it looked to these cases, and it viewed this as an

1 administrative review proceeding.

2 If I could reserve the balance of my time.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Panner.

5 ORAL ARGUMENT OF AARON M. PANNER

6 ON BEHALF OF THE RESPONDENT

7 MR. PANNER: Mr. Chief Justice, and may it
8 please the Court:

9 The language of section 145, the structure
10 of the judicial review provisions in the Patent Act, the
11 long history of the provision, and this Court's
12 constructions of its predecessors all make clear that
13 the Government's argument that a plaintiff is barred
14 from introducing new evidence in an action under section
15 145, except in the unusual if not extraordinary
16 circumstance where the applicant had no opportunity to
17 introduce the substance of that evidence, is incorrect.

18 Section 145 does not follow the modern norm
19 of on-the-record review. Such review is afforded under
20 sections 141 to 144. And no principle of administrative
21 law supports the Government's "no opportunity" standard
22 in situations where Congress has authorized a trial de
23 novo to obtain relief from adverse agency action.

24 CHIEF JUSTICE ROBERTS: The problem I have
25 with your submission: You say there are basically two

1 routes to get review of a denial by the Patent Office.
2 The first is, under 141, you appeal to the Federal
3 Circuit, right, and in that situation, you're limited to
4 the record before the agency --

5 MR. PANNER: Yes, Your Honor.

6 CHIEF JUSTICE ROBERTS: -- on which you
7 lost. And there's deference to the agency, which ruled
8 against you.

9 Under 145, you can add new evidence, you
10 could address questions that the PTO raised, saying you
11 don't -- you haven't dealt with this valve in the back,
12 and you could say, well, here's new evidence dealing
13 with that. There's no deference to the agency, and to
14 some extent you can pick which judge you want to hear,
15 to the extent you can -- can do that.

16 Why would anybody proceed under section 141
17 instead of 145?

18 MR. PANNER: Well, Your Honor, to be clear
19 about what is permitted under section 145, it is correct
20 that new evidence can be permitted to go to issues that
21 have been properly ruled on by the PTO in the course of
22 ruling on the ex parte application.

23 The reason that appeals to the -- to the
24 Federal Circuit are quite common is because often the
25 issue that is the basis for the rejection is a legal

1 issue. And as to those issues, there's de novo review
2 in the Federal Circuit. The Federal Circuit will be
3 ruling on those legal issues in time in any event. It
4 is really in the circumstance where there is a factual
5 question as to which new evidence is relevant, where the
6 applicant will avail himself of what --

7 CHIEF JUSTICE ROBERTS: So, that in -- in
8 every case where it's anything other than a purely legal
9 issue, you would go under 145?

10 MR. PANNER: Well, Your Honor, if you had
11 evidence that you wanted to present, and the remedies at
12 the PTO were inadequate for one reason or another. But
13 in thinking about the practical implications of the
14 procedural option that section 145 affords, it's
15 important to recognize that this procedure has been in
16 place for generations, and it has been understood by the
17 patent bar as reflected in decisions of the --

18 CHIEF JUSTICE ROBERTS: Well, I know.
19 That's why I'm -- I'm really confused, because I take it
20 that people don't often use 145, right? They almost
21 always appeal to the Federal Circuit.

22 MR. PANNER: Well, I think that the number
23 of cases involving rejections that are taken up into
24 court are somewhat limited, in part because applicants
25 often have an adequate remedy before the PTO. But where

1 there is a circumstance where there has been a final --
2 a Board action, a case like this one, where the --
3 the grounds for rejection, not meaning the technical
4 grounds, because the grounds of written description had
5 been identified in the examiner's decision, but where
6 the reasoning that justified the rejection was quite new
7 in the decision of the Board and where there were --
8 there was factual evidence that the applicant wanted to
9 submit to a generalist district court to permit the
10 district court to understand where in the specification
11 the support for these elements --

12 CHIEF JUSTICE ROBERTS: Well, Ms. --
13 Ms. Anders told us that there's a procedure before the
14 PTO that lets you deal with these -- that sort of
15 something came up that you didn't think about, and you
16 can address that.

17 MR. PANNER: Your Honor, what -- what
18 Ms. Anders was referring to, I believe, is the
19 possibility to reopen where there are new grounds for a
20 rejection. There were no new grounds here because it
21 was still a written description rejection. The
22 applicant did argue in -- in filing for rehearing that
23 the explanation that the Board had provided was one that
24 he had not been able to discern from the examination --
25 the examiner's rejection.

1 And if you just look at the record in this
2 case, when the examiner said that there was support
3 lacking for the features that were -- where the Board
4 eventually did -- did affirm, there is no explanation as
5 to what element was missing, why the -- why the feature
6 was not supported in the specification. The Board
7 provided that reasoned explanation, and the applicant
8 tried to respond, and the Board refused to -- to accept
9 it.

10 JUSTICE BREYER: Do you think -- in terms of
11 the second question on the standard of review, I'm
12 somewhat -- I'd like your response to the approach, that
13 where there's ambiguity -- I mean, you're going to win
14 if there's no ambiguity. But if there's ambiguity, I
15 think that 1946 makes a difference. That is, preceding
16 that time, every agency went its own way, and you had
17 dozens of specialized methods of review. And the whole
18 purpose of 50 years of administrative law has been to
19 try to create uniformity across agencies in a vast
20 Federal Government.

21 And now, what was obviously worrying me in
22 the first case and this case, too --

23 MR. PANNER: Yes, Your Honor.

24 JUSTICE BREYER: -- is that we're chipping
25 away at that, and that will be very hard for lawyers and

1 for ordinary people to understand if we suddenly go back
2 and create specialized rules in favor of each agency
3 that always wants a specialized rule, of course; they
4 think what they do is terribly important, which it is,
5 I'm sure.

6 But that's -- that's why I'm saying if
7 ambiguity on the standard of review, you go with
8 uniformity.

9 MR. PANNER: Right. Well, there's really
10 two points, Your Honor: With respect to standard of
11 review, which is separate from the question of the
12 admissibility of the evidence -- on standard of review,
13 the APA says that where there's a trial de novo, the
14 standard is whether the finding is unwarranted by the
15 facts under (2)(F). So --

16 JUSTICE BREYER: That's -- that begs the
17 question in a sense because they're interlinked. I
18 mean, the same reasons would support that it's not a
19 trial de novo even if you introduce some new evidence.

20 MR. PANNER: Well, I think that --

21 JUSTICE BREYER: It is a -- it is an old
22 trial with some new evidence, and there will be a
23 thousand different variations on that theme.

24 MR. PANNER: I think that goes to Justice
25 Sotomayor's point really, which is that there is a trial

1 de novo, and clearly at a minimum what the courts are
2 talking about when they refer to this, not 5 times, not
3 10 times, but dozens of times, this Court several times,
4 lower courts pervasively, when they are talking about a
5 de novo proceeding, they're talking about the fact that
6 the applicant can introduce new evidence to attempt to
7 overcome the adverse action that was -- was entered by
8 the agency.

9 JUSTICE BREYER: All right. So, the new
10 part -- I get that.

11 MR. PANNER: Okay. And then the question
12 becomes, what is the appropriate standard of review when
13 there is new evidence going to this question? And the
14 answer here goes I think to -- section (2)(F) says that
15 there's a -- the question is whether it's warranted by
16 the facts. There is then the question of what weight
17 may be afforded to a particular agency -- agency
18 determination. At a minimum, the fact that there has
19 been a rejection shifts the burden. When an applicant
20 goes to the PTO, there's an assumption of an entitlement
21 to patent, unless the PTO can show that the applicant is
22 not entitled to that patent. So, the burden is on the
23 PTO.

24 Once there has been a proper rejection by
25 the agency and the Board has ruled, then the applicant

1 bears the burden. So, at a minimum, there has been a
2 shifting. And the applicant would then bear the burden.
3 And as a practical matter, as the Federal Circuit
4 indicated, the district judge will weigh the evidence
5 before it, including the new evidence and the findings
6 by the agency, in making its determination as to whether
7 the applicant has carried -- carried his burden to show
8 that he's entitled to the patent.

9 JUSTICE KENNEDY: If the judge does that,
10 what -- how does he articulate the weight that he gives
11 to what the PTO find? Does he say I give deference to
12 this? I give substantial deference? This was all
13 discussed -- page 9 of your brief, you summarized what
14 the majority opinion of the en banc court did.

15 MR. PANNER: Yes, Your Honor.

16 JUSTICE KENNEDY: And in that connection, on
17 this same line, do you -- do you agree with that
18 summary?

19 MR. PANNER: I do, Your Honor. That is to
20 say that what the Federal circuit recognized is that in
21 determining the weight to give to new evidence and
22 determining what weight to give to the determined --
23 prior determination of the agency, it's appropriate for
24 the district court to look at the circumstances of the
25 new evidence. And one of the things that's -- this is

1 an equitable -- well, was an equitable action. And, of
2 course, the judge is sitting without a jury.

3 In Microsoft, there was obviously concern by
4 this Court that there not be shifting standards of proof
5 that would be confusing to a jury and could lead to
6 collateral litigation about that. Where a district
7 judge is making a determination about a factual issue,
8 the district judge can as a practical matter quite
9 reasonably determine what was before the Board, what did
10 the Board decide, what was the basis for that, how
11 strongly supported is it, versus how -- how -- to what
12 extent is this new evidence something that really
13 requires me to look at this anew.

14 JUSTICE KENNEDY: Well, in line with
15 Justice Breyer's question, can you give us an example of
16 some other agency review proceeding that is somewhat
17 like this, or is this just unique?

18 MR. PANNER: I don't think it's entirely
19 unique at all, Your Honor. That is to say, for example,
20 in proceedings where there's orders to pay money by the
21 FCC, the findings of the agency are given prima facie
22 weight in an action -- in an enforcement action. And
23 so, new evidence is permitted, and the district judge
24 would make a determination based on the record and the
25 new evidence. But the party or the agency seeking to

1 enforce the prior order would be able to rely on those
2 factual findings to -- as prima facie evidence where, if
3 there was no contrary evidence, it would actually
4 establish those facts.

5 There are other administrative review
6 schemes that do afford trial de novo in which the -- you
7 know, there may be more or less deference to whatever
8 the agency did depending on -- on what the record may
9 reflect about the considered judgment of the agency.

10 JUSTICE GINSBURG: Are there limits on the
11 new evidence that can be produced? Are there any
12 limits, in your view?

13 MR. PANNER: Well, Your Honor, I think that
14 the principle of estoppel that was recognized in Barrett
15 is not one that we're -- we're challenging. That is to
16 say, in a circumstance in which an applicant -- and, of
17 course, that was an interference proceeding, and it's
18 perhaps easier to foresee this happening in an
19 interference context, but in that case, the plaintiff
20 had actually suppressed, had directed witnesses not to
21 answer questions that went into a particular factual
22 area and then, when -- after appeal and when the
23 district court action was brought, attempted to
24 introduce the very evidence that he had -- that the
25 applicant had deliberately suppressed. And the district

1 court said, look, that -- that is -- gives rise to an
2 estoppel, which seems to me a generally applicable
3 principle that --

4 JUSTICE BREYER: All right. Well, if you're
5 willing to accept that, then what about broadening that
6 to prevent people from running around the PTO, and
7 simply saying unless the -- unless the person, the
8 potential patentee, unless he wants to -- unless he has
9 shown he can show that he's innocent, that is to say it
10 wasn't deliberate, it wasn't negligent, it wasn't a part
11 of a trial -- of a strategy, unless he shows he was
12 totally without sin in some form of words in not
13 introducing the evidence the first time, he can't
14 introduce it now?

15 MR. PANNER: I think the difficulty with
16 that, Your Honor, is not only is it inconsistent with
17 the practice of the courts, which have always recognized
18 that, but it also ignores the fact that there needs to
19 be decisions that an applicant makes about what evidence
20 to present to the PTO. And there may be good cause for
21 not presenting evidence in the PTO that becomes quite
22 relevant once --

23 JUSTICE BREYER: Well, say that. Say unless
24 he can show that there was good cause for his not having
25 introduced it before the PTO, he -- the -- the court now

1 won't consider it.

2 MR. PANNER: Well, Your Honor, we would --
3 we would certainly meet that good cause standard in this
4 case, but the thing that I think is difficult about that
5 standard is that it could potentially lead to all sorts
6 of collateral litigation. In a typical case, for
7 example, an applicant will seek to introduce new expert
8 testimony that either was not or was -- is additional to
9 whatever was at issue -- was offered in the PTO. Often,
10 expert testimony will not be offered at all in an ex
11 parte application.

12 JUSTICE SOTOMAYOR: So, give us a standard
13 and how is what -- the good cause that you're somehow
14 willing to accept different from the Government's
15 reasonable cause standard? And equity seems to have
16 required an intentional or bad faith withholding. Is
17 that what you want to limit yourself to? What do you do
18 with sort of the in between? The intentional and the
19 grossly negligent.

20 MR. PANNER: Justice Sotomayor, to be clear,
21 the proper standard is -- does not permit exclusion of
22 evidence because there was good cause to present it and
23 it was not.

24 The standard for -- which we think is
25 supported in the cases is one that would permit the

1 introduction of evidence as the Federal Circuit said
2 consistent with the rules of evidence and civil
3 procedure. That's why principles of estoppel, which are
4 reflected in ordinary equity practice, not just
5 administrative review contexts, would be -- would be
6 applicable and could lead to the exclusion of evidence.

7 JUSTICE SOTOMAYOR: And what do you see the
8 limits of that estoppel -- equity principles? I think
9 that's what Justice Breyer was -- was referring to.
10 What would be the contours of your equity limits?

11 MR. PANNER: And I think that looking at the
12 -- at the cases that were decided before 1952, which
13 everyone seems to -- to agree is -- is the magic date,
14 the furthest that any court went was the decision in
15 Barrett. And it's interesting that the panel decision
16 in this case also relied on the idea in Barrett.

17 JUSTICE SOTOMAYOR: That's a little bit
18 unfair, to characterize the cases as limited to that.
19 Some talked about negligence.

20 MR. PANNER: Not --

21 JUSTICE SOTOMAYOR: And some courts said it
22 should be intentional. There was a debate back and
23 forth.

24 MR. PANNER: In the court of -- in the court
25 of appeals, Your Honor, the only exclusion of

1 evidence --

2 JUSTICE SOTOMAYOR: Yes, I agree.

3 MR. PANNER: -- was from Barrett, and that
4 was a case that involved, again, directing a witness not
5 to answer, the suppression of inquiry into a particular
6 factual area where the applicant then -- changing his
7 story and claiming a different date for reduction of
8 practice and a different basis for reduction to practice
9 than had been argued before the PTO -- attempted to
10 introduce the evidence that he had suppressed.

11 So, that's a very different circumstance.
12 And the courts -- the decisions are actually at pains to
13 say that Barrett should not be over-read. The Third
14 Circuit in the Carborundum case said that; the Nichols
15 case, which we've we cited in our brief, said that; and
16 of course, as you pointed out, Judge Hand observed that
17 in the -- in the Dowling case. Globe-Union said that.
18 So, even the cases that the Government itself relied on
19 were -- accepted evidence, despite the arguments that
20 were made by the defendants in those cases that this was
21 evidence that should have been excluded because it could
22 have been presented, and -- and did consider it.

23 And that brings us, I think -- there has
24 been a lot of discussion about Morgan and the standard
25 of review and what Morgan has to say about that. And

1 the critical point that this Court recognized in
2 Microsoft was that Morgan is one of the early cases and
3 then -- and Radio Corporation is another that depend on
4 an idea of the presumption of validity, which of course
5 was then adopted by Congress in section 282 as a
6 statutory presumption, that was given that common law
7 meaning that required clear and convincing evidence.
8 But the clear and convincing evidence is to overcome the
9 grant of a property right to the defendant in those
10 cases.

11 What's critical in Morgan is the fact that
12 the -- the Patent Office had granted a patent to the
13 defendant, and it was a challenge to the validity of
14 that patent that the plaintiff's case relied on. And
15 it's -- and that's absolutely clear because the Court
16 cites to Johnson v. Towsley, which is a case involving a
17 land grant. And what the Court says is our presumption
18 is that when the executive has the power to give
19 property rights, we don't get to review it.

20 Now, in this case, we see a limited
21 exception because there's a statute that actually tells
22 us we have to do it, but that exception is going to be
23 limited. But if you look at what Morgan relies on,
24 Morgan is not relying on agency expertise; it's relying
25 on agency authority, which is a different matter. And

1 so -- and the authority that the agency had to grant a
2 property right. In the -- in the conception of a -- of
3 the court of 1893 and the administrative law that
4 existed in 1893, the fact that there was no property
5 right being challenged in an action where there was an
6 effort to overcome a rejection means that this idea
7 about the presumption of the validity of the rights that
8 had been granted by an executive department doesn't come
9 into play. There had been no rights granted by the
10 executive department, and there's a new proceeding in
11 which, to quote Professor Merrill's article, the court
12 had "the whole case." And that's really reflected in
13 the language that Congress chose.

14 Now, of course, that -- the differences
15 between what Congress provided under section 145 and the
16 modern administrative review do lead to some -- to some
17 questions. There is the question, you know, what should
18 the standard be if there is no new evidence? Which --
19 you know, which the court looked at.

20 JUSTICE GINSBURG: And on that I think you
21 -- you're not taking the position that Judge Newman did.
22 I think -- didn't you say that if no new evidence is
23 introduced in a 145 proceeding, then the court engages
24 in APA-style review?

25 MR. PANNER: Your Honor, Judge Newman said

1 that if there -- that all -- all findings should be de
2 novo in a section 145 action, but the -- the majority of
3 the en banc court said that if there's no new
4 evidence -- relying on what the Federal Circuit had held
5 for many years, that if there's no new evidence, then
6 the standard would be the substantial evidence standard
7 that would apply on appeal.

8 JUSTICE GINSBURG: And that -- and that --

9 JUSTICE KENNEDY: And you agree with that?

10 MR. PANNER: We haven't taken a position on
11 it, but let me suggest --

12 JUSTICE KENNEDY: I -- I noticed that.

13 MR. PANNER: -- why it might be right, Your
14 Honor, which is that section 141 and section 144 do --
15 this Court in -- you know, held in Zurko that once you
16 are in a situation where there is no new evidence -- and
17 as an aside, Zurko emphasized that Morgan was a case
18 that was on no new evidence. Where you have a case
19 that's on no new evidence, there -- the APA standard of
20 review, substantial evidence, arbitrary/capricious
21 review, applies. And it might -- this might be the sort
22 of narrow circumstance where to apply a de novo
23 standard, even though that may be otherwise suggested by
24 the language of section 145, would create an anomaly, as
25 -- as this Court recognized in Zurko.

1 JUSTICE SOTOMAYOR: It seems to me you were
2 introducing such a gamesmanship. Anybody who wanted to
3 get out of substantial deference under the APA just has
4 to present an expert. That -- that's what makes little
5 sense to me, trying to -- now we're hair-splitting in a
6 very minute way.

7 MR. PANNER: Right. I don't -- I don't
8 think --

9 JUSTICE SOTOMAYOR: Articulate a standard
10 that would -- Newman is suggesting total de novo review
11 with no reference to any kind of presumption applied to
12 the PTO decision. Another way --

13 MR. PANNER: I'm not sure --

14 JUSTICE SOTOMAYOR: -- to look at it is the
15 way I suggested, which is it doesn't matter whether
16 there's new evidence or not; what is the level of
17 respect that you are going to give to the PTO factual
18 findings?

19 MR. PANNER: Right. And, Your Honor, I
20 think that the standard of proof is one of -- is the
21 preponderance of the evidence. And the question of what
22 weight -- as the Federal Circuit said, what weight to
23 afford to that prior finding of the PTO would depend on
24 what the record showed. That is the -- as the facts of
25 the case may appear -- in section 145, it requires the

1 district court to look at the findings and look at the
2 new evidence and to then make the determination.

3 JUSTICE SOTOMAYOR: Be -- as in the language
4 of Morgan, be convinced that the PTO was wrong?

5 MR. PANNER: As section -- as I say, the
6 language of Morgan deals with the circumstance in which
7 there's a challenge to the validity of an issued patent.
8 The action that was at issue, the action as to which the
9 validity was being challenged, was not the denial of the
10 patent to the applicant; it was the fact that the PTO
11 had issued a patent to the defendant in that case. And
12 so, there was a collateral attack, effectively a
13 collateral challenge to the validity of that issued
14 patent. And that's why Radio Corporation of America
15 cites Morgan, and that's how, you know, it's relevant to
16 the -- this Court's, you know, decision in Microsoft,
17 that the statutory presumption of validity carries this
18 heightened standard of proof.

19 JUSTICE BREYER: My goodness. Suppose
20 you're a lawyer, back to the Chief Justice's question,
21 as you are, and you have the client there, and you're
22 thinking, you know, if he puts all his evidence before
23 the PTO, and they say no, we've had it. I mean, there
24 we are. But if we hold back something, well, then we're
25 going to get not -- get de novo review and a district

1 court. Boy! But if we're too obvious about holding
2 back something, we run into the estoppel rule.

3 My goodness. You're -- you're in a mess, it
4 seems to me, trying to advise a client what to do in
5 that situation. Better not say hold something back; on
6 the other hand, if he does he's pretty -- how do you
7 deal -- you see?

8 MR. PANNER: I think the -- I understand the
9 concern, but the practicalities of patent prosecution
10 practice are that no applicant would hold back evidence
11 in an effort to -- to produce that sort of tactical
12 advantage because once --

13 CHIEF JUSTICE ROBERTS: Because -- I'm
14 sorry. Go ahead.

15 MR. PANNER: I think because it's -- it's
16 frankly more straightforward and easier to try to meet
17 those objections in the Office. That's what usually
18 happens, is that there's a dialogue with the examiner to
19 try to meet the grounds for rejection.

20 One of the things that I think is important
21 to take into account with respect to the context of this
22 case is there were a vast number of rejections. There
23 was not just a rejection on written-description and
24 enablement grounds, but there were rejections for double
25 patentings; there were rejections for anticipation;

1 there were rejections for obviousness. And every single
2 one -- every single one -- of those grounds for
3 rejection was overcome in the appeal before the Board.
4 And many of the written-description rejections were
5 overcome in the appeal before the Board. And at -- with
6 respect to every one, if one goes back and reads the
7 examiner's decision, the examiner did provide an
8 explanation as to what was lacking with respect to
9 certain -- certain elements of the claimed invention,
10 and with respect to every single one of those, the Board
11 reversed.

12 So, where the applicant was provided a fair
13 opportunity to try to meet the concerns, the applicant
14 did so, and the Board ruled in his favor. And he again
15 attempted -- there's no question of sandbagging here.
16 The -- the applicant brought these arguments to the
17 Board in the rehearing petition, in the request for
18 rehearing, and said here's my answer to your more
19 focused explanation. And they -- they refused to hear
20 it.

21 So, as a practical matter, I think that --
22 and you don't have to take my word for it, again,
23 because this procedure has been in place for so long,
24 and problems have not arisen. And even if there were
25 uncertainty as to what the precise standard for

1 admissibility was, the applicants would have every
2 reason to test that and to -- to try to do something
3 along that line if that were a realistic option and
4 favorable.

5 The fact of the matter is that that has not
6 happened because the applicants have every reason in the
7 world to pursue the application with vigor before the
8 Office. And the Federal Circuit, which, of course, is
9 more familiar with the -- the patent application process
10 than any other court, had no concerns that the rule that
11 they were adopting would lead to abuses.

12 CHIEF JUSTICE ROBERTS: I guess, as a
13 practical matter, these things all end up before the
14 Federal Circuit anyway, right?

15 MR. PANNER: That's right, Your Honor.

16 CHIEF JUSTICE ROBERTS: And I suppose that
17 -- if you had the same case and one is coming up under
18 the 141 and the other under 145, I suppose it's
19 theoretically possible they could reach different
20 results because of different standards of review.

21 MR. PANNER: Well, Your Honor, you can't do
22 both.

23 CHIEF JUSTICE ROBERTS: No, no. I know.
24 I'm not saying -- the point is that although they all
25 come before the Federal Circuit, they may come to them

1 in a very different posture that would cause the Federal
2 Circuit to rule differently if you had the same case
3 under one and under the other.

4 MR. PANNER: Well, Your Honor, I -- it
5 wouldn't be on the same record.

6 CHIEF JUSTICE ROBERTS: Right.

7 MR. PANNER: If it were on the same record,
8 then presumably the -- the issue that would be presented
9 would be quite similar. The only time I can see that --
10 so, in other words, if there were a different record,
11 it's true that the Federal Circuit's review of the
12 district decision would be -- it would be the difference
13 that this Court recognized in Zurko. It would be the
14 court/court standard of review, which is -- gives
15 perhaps slightly less weight to the decision of the
16 district court than the court/agency review. But that
17 doesn't seem like an advantage. In the -- in a
18 circumstance at least where an applicant has prevailed,
19 the applicant would be more likely to see the victory
20 taken away by the Federal Circuit.

21 Unless the Court has questions.

22 Thank you, Your Honor.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Panner.

25 Ms. Anders, you have 3 minutes remaining.

1 REBUTTAL ARGUMENT OF GINGER D. ANDERS

2 ON BEHALF OF THE PETITIONER

3 MS. ANDERS: Thank you.

4 This is an action for judicial review of
5 agency determination. This is an action that -- that
6 requires the patent applicant to -- to seek a property
7 right from the agency, to have it denied, and to
8 challenge that in court. And as a result, this Court
9 said in Zurko that this is review of an agency
10 determination, and, therefore, Morgan's deferential
11 standard should be carried forward into the APA.

12 And in construing Morgan, the Court in Zurko
13 did not consider that it was -- whether a property right
14 had been awarded or not; it was simply that the agency
15 had made a determination in its expertise. And I think
16 that goes to why it would not be sufficient for the
17 court simply to weigh the evidence differently. In
18 every other agency -- judicial review proceeding of
19 agency action, the rule is that the agency is the
20 primary decisionmaker. The agency has to consider the
21 evidence first and make a determination. That aids
22 judicial review. It allows the agency to apply its
23 expertise. And we generally don't think of the court as
24 being the one who should make the first determination on
25 issues of fact. And that's particularly --

1 JUSTICE SCALIA: Yes, but you have a strange
2 statute here. I don't know any statute that -- that
3 reads this way. "As the facts" -- "as the facts" --
4 where is it? "As the facts may" --

5 MS. ANDERS: Yes. "As the facts" --

6 JUSTICE SCALIA: "As the facts in the case
7 may appear." That's --

8 MS. ANDERS: Well, that language was in the
9 statute in Morgan when the Court construed this as
10 judicial review. And I think that -- there would have
11 to be a compelling reason in order to interpret the
12 statute to permit an -- to permit the applicant to
13 introduce evidence that he failed without cause, without
14 justification, to provide to the agency.

15 And I don't think that Mr. Hyatt has shown
16 any such justification. And --

17 JUSTICE KAGAN: Well, but I guess the
18 compelling reason is the statutory language and
19 especially with respect to the admissibility of evidence
20 question. I mean, it -- the standard that you suggest
21 just can't be derived from the statutory language; isn't
22 that right?

23 MS. ANDERS: Well, I think certainly there's
24 an exhaustion requirement within the statute. The Board
25 has to have considered the application. And, therefore,

1 it would make no sense to have the Board consider the
2 application if it didn't have to consider all of the
3 evidence that was provided.

4 So, I think in that sense, you know, the
5 standard that the Federal Circuit put in place and that
6 Mr. Hyatt is proposing really is providing --

7 JUSTICE SOTOMAYOR: So, why didn't the court
8 just say what you said? If it -- if -- not the court;
9 Congress. If you admit that Congress intended a section
10 145 action to permit new evidence, if it wanted to limit
11 that evidence to something that could not have been
12 found with due diligence or whatever your limitations
13 are, why did it speak more broadly? I mean, the
14 statutory language suggests "as the facts in this case,"
15 not in the case before the PTO. As law and -- "as
16 equity might permit."

17 This is very broad language.

18 MS. ANDERS: Well -- so, the language could
19 be taken to suggest that some new evidence is
20 admissible, but I think then we look to the fact that
21 this -- just like section 141 is a judicial review
22 proceeding, and there should have to be compelling
23 reason before we deviate from the normal deferential
24 standards that apply when a -- when a court is reviewing
25 an agency's determination.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

3 (Whereupon, at 12:03 p.m., the case in the

4 above-entitled matter was submitted.)

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